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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 216

REAL ESTATE CORPORATION, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question is whether the taxpayer-corporation's activities in purchasing unimproved real estate lots at tax sales and selling them constituted a "business." If so, the lots, being "held * * * primarily for sale to customers in the ordinary course of [the taxpayer's] trade or business," were not capital assets within the meaning of § 117(a) of the Internal Revenue Code of 1939 and the gain realized from their sale was taxable as ordinary income. The Tax Court

found that the lots were so held and were not capital assets, and the court of appeals affirmed.

The point at which real estate buying and selling activities cease to be "investment" and become a "business" cannot, of course, be defined by an easy formula, and the myriad of cases on the subject has produced a consensus that each case turns on its particular facts and that the trial court's decision should be affirmed unless "clearly erroneous."[1] Whether, on its particular facts, the correct result was reached in this case is not a question for this Court. The principles applied by the court of appeals are not in conflict with those followed by other courts of appeals.[2] The petition for certiorari

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[1] *E.g., Tidwell* v. *Commissioner*, 298 F. 2d 864 (C.A. 4th); *Heebner* v. *Commissioner*, 280 F. 2d 228 (C.A. 3d), certiorari denied, 364 U.S. 921; *Bauschard* v. *Commissioner*, 279 F. 2d 115 (C.A. 6th); *Kaltreider* v. *Commissioner*, 255 F. 2d 833 (C.A. 3d); *Zack* v. *Commissioner*, 245 F. 2d 235 (C.A. 6th), certiorari denied, 355 U.S. 823; *S.E.C. Corp* v. *United States*, 241 F. 2d 416 (C.A. 2d), certiorari denied, 354 U.S. 909; *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C.A. 3d); *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C.A. 6th), certiorari denied, 352 U.S. 928; *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5th); *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9th), certiorari denied, 350 U.S. 840; *Victory Housing No. 2* v. *Commissioner*, 205 F. 2d 371 (C.A. 10th).

[2] To find a conflict, petitioner cites other cases holding the frequency of sales to be but one of the factors to be considered and then asserts that the courts below treated that factor alone as determinative. The answer is that the courts below did not treat that, or any other single, factor as determinative but properly took into account all of the relevant factors in arriving at the overall judgment that petitioner's activities amounted to a "business."

should be denied.

Respectfully submitted,

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AUGUST 1962.

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